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Saguaro Desert Trust & Executive Trustee*

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATRINA PERKINS STEINBERGER,
as Executor of the Estate of Charles A.
Perkins, deceased, and individually,

Plaintiff,

v.

INDYMAC MORTGAGE SERVICES, a
division of ONEWEST BANK, F.S.B., a
Federally Chartered Savings Bank;
DEUTSCHE BANK NATIONAL
TRUST COMPANY, as Trustee of the
INDYMAC INDX MORTGAGE LOAN
TRUST 2005-AR14; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., a Delaware
Corporation; OCWEN LOAN
SERVICING, LLC, a Limited Liability
Company; KEELEY KRISTINE SMITH,
an Attorney licensed with the Arizona
State Bar; JOHN AND JANE DOES 1-
1000, XYZ CORPORATIONS 1-15;
ABC LIMITED LIABILITY
COMPANIES 1-15; and 123 BANKING
ASSOCIATIONS 1-15,

Defendants.

Case No. 2:15-cv-00450-ROS

**PLAINTIFFS/
COUNTERDEFENDANTS/
THIRD-PARTY DEFENDANTS'**

**MOTION FOR RECONSIDERATION
REGARDING MOTION TO
APPROVE NO SUPERSEDEAS BOND
AND FOR STAY OF EXECUTION
OF JUDGMENT UNDER RULE 62(f)**

--AND--

**MOTION TO APPROVE NO
SUPERSEDEAS BOND AND FOR
STAY OF EXECUTION OF
JUDGMENT UNDER RULE 62(d)**

DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee for INDYMAC
INDX MORTGAGE LOAN TRUST
2005-AR14, MORTGAGE PASS-
THROUGH CERTIFICATES SERIES
2005-AR14,

Counterclaimant,

v.

1 KATRINA PERKINS STEINBERGER, as
2 Executor of the Estate of Charles A.
Perkins, deceased, and individually,

3 Counterdefendants.
4

5 DEUTSCHE BANK NATIONAL TRUST
6 COMPANY, as Trustee for INDYMAC
7 INDX MORTGAGE LOAN TRUST
2005-AR14, MORTGAGE PASS-
THROUGH CERTIFICATES SERIES
2005-AR14,

8 Third-Party Plaintiff,
9

10 v.

11 SAGUARO DESERT TRUST;
KATRINA PERKINS STEINBERGER, as
12 Executive Trustee of Saguaro Desert
Trust; M&I MARSHALL & ILLSLEY
BANK, a Wisconsin Banking Corporation;
13 QUALITY LOAN SERVICE
CORPORATION, a California
14 Corporation; RANCHO ALTA VIDA
HOMEOWNERS' ASSOCIATION, an
15 Arizona Non-Profit Corporation; DOE
INDIVIDUALS OR ENTITIES 1-10;
16 UNKNOWN HEIRS AND DEVISEES
OF CHARLES A. PERKINS,
17 DECEASED,

18 Third-Party Defendants.
19

20
21 **I. INTRODUCTION.**

22 Pursuant to Rule 62, Fed.R.Civ.P., and Rule 8(a)(1), Fed.R.Civ.App.P., Plaintiff
23 Katrina Perkins Steinberger as Executor of the Estate of Charles A. Perkins, deceased, and
24 individually, Saguaro Desert Trust, and Katrina Perkins Steinberger as Executive Trustee
25 (collectively, "Steinberger") hereby files their Motion for Reconsideration of this Court's
26 Order (Doc. 216) denying Steinberger's Motion to Approve No Supersedeas Bond and for
27 Stay of Execution of Judgment. Steinberger additionally moves for no supersedeas bond
28

1 and a stay of execution of judgment on alternative grounds, under Rule 62(d). Steinberger
2 respectfully submits that in the judicial foreclosure action where the anti-deficiency statute
3 prevents any recovery against the Plaintiffs/Counterdefendants/Third-Party Defendants, no
4 supersedeas bond can be required in order to stay execution of the Judgment and Decree of
5 Foreclosure (the “Judgment”) filed by this Court on January 23, 2017 (Doc. 212).

6 7 II. LEGAL ANALYSIS.

8 9 A. Rule 62(f) Applies to the Judgment and Decree of Foreclosure Without 10 Further Action on DBNTC as Trustee’s Part.

11 Rule 62(d) provides that Plaintiffs may obtain a stay of operation of the Judgment
12 by supersedeas bond. The stay takes effect when the court approves the bond. Under Rule
13 62(f), “[i]f a judgment is a lien on the judgment debtor’s property under the law of the state
14 where the court is located, the judgment debtor is entitled to the same stay of execution the
15 state court would give.”

16 First, it is critical to note that DBNTC as Trustee, agreed that Rule 62(f) applies,
17 stating that “the final judgment issued in this case is ‘a lien on the judgment debtor’s
18 property.’” See Doc. 214 at 3:8-9. Since the parties are in agreement, Steinberger
19 respectfully requests that this Court grant the previously filed Motion, order no
20 supersedeas bond, and stay execution of the Judgment.

21 Rule 62(f) should be applied for additional reasons as well. First, Arizona statute
22 makes it clear that a judicial foreclosure judgment is a lien on the at-issue Property,
23 without the judgment creditor’s need to take further action.

24 Except as provided in subsections B and C of this section, if a mortgage is
25 given to secure the payment of the balance of the purchase price ... of a
26 parcel of real property of two and one-half acres or less... the lien of
27 judgment in an action to foreclose such mortgage shall not extend to any
28 other property of the judgment debtor....

1 A.R.S. § 33-729(A)(emphasis supplied). The statute affirms that the judgment *is* a lien, in
2 subsection B:

3
4 The **balance due on a mortgage foreclosure judgment** after sale of the
5 mortgaged property **shall constitute a lien** against other property of the
6 judgment debtor....

7 A.R.S. § 33-729(B)(emphasis supplied). Statutes are to be interpreted to give effect and
8 import to every word. “A cardinal rule of statutory interpretation is to give full effect to
9 each statutory word or phrase so that no part is rendered void, superfluous, contradictory or
10 insignificant.” *Westburne Supply, Inc. v. Diversified Design and Const., Inc.*, 170 Ariz.
11 598, 600 (Ct. App. 1992). “What a statute necessarily implies is as much a part of the
12 statute as what it makes explicit.” *Id.* The use of the phrase “lien of judgment,” coupled
13 with an *absence* of a provision requiring that the judgment be recorded to attain that status,
14 mandates the conclusion that a judgment of judicial foreclosure is a lien without having to
15 record the judgment.

16 The conclusion that a judicial foreclosure judgment creditor need not record the
17 judgment for it to be a lien on the real property, comports with common sense. Indeed,
18 this Court’s Judgment states, “[t]he entire judgment amount ... is secured by the Deed of
19 Trust .. and the Deed of Trust constitutes a valid lien against the Property, having priority
20 over any purported interest of any party named in this litigation.” *See* Doc. 212 at 3 ¶ 6.
21 A judgment creditor in a judicial foreclosure does not have to record that judgment to
22 perfect the judgment creditor’s interest in the property. This result is bolstered by the
23 terms of this Court’s Judgment itself, which unequivocally is an *in rem* judgment of
24 judicial foreclosure.

25 Steinberger’s interpretation of Rule 62(f) is in line with the public policy of
26 Arizona, which works in favor of the Borrower. *See, e.g., CSA 13-101 Loop, LLC v. Loop*
27 *101, LLC*, 236 Ariz. 410, 412 ¶ 12 (2014)(“[T]he deed of trust framework generally,
28 accords with Arizona’s long-recognized public policy of protecting debtors.”); *SAL*
Leasing, Inc. v. State, 198 Ariz. 434, 441 ¶ 30 (Ct. App. 2000)(Arizona public policy

1 provides safeguards in mortgage foreclosures, "to protect vulnerable borrowers from
2 overbearing lenders."). The purpose behind subsection (f) is to protect a citizen's interest
3 in her real property under state law, which the law recognizes as unique and irreplaceable
4 if lost. This interest is particularly keen when that property is the litigant's home, as it is
5 here. Arizona law protects those interests to a greater extent than other interests, through
6 the application of A.R.S. § 12-2108 and Ariz.R.Civ.App.P. 7 to the supersedeas bond
7 issue. Under the statute, Arizona protects Steinberger's interest in her home with the
8 following standard for the granting of a stay with no supersedeas bond:

9 [T]he amount of the bond that is necessary to stay execution during the
10 course of all appeals or discretionary reviews of that judgment by any
11 appellate court shall be set as the lesser of the following:

- 12 1. The total amount of damages awarded excluding punitive damages.
- 13 2. Fifty per cent of the appellant's net worth.
- 14 3. Twenty-five million dollars.

14 A.R.S. § 12-2108(A). Rule 62(f) applies to the Judgment and Steinberger's motion to
15 approve no supersedeas bond for a stay.

16 Respectfully, the case cited by the Court is inapposite. *Wichansky v. Zowine*, 2016
17 WL 3345481 (D.Ariz. June 16, 2016). In *Wichansky*, a money judgment in the amount of
18 \$27,625,500.00 was entered against the defendants after a jury trial. *Id.* at *1. Of that
19 sum, \$11,000,000 was compensatory damages, and the rest was punitive damages.
20 Defendants filed post-trial motions and moved for a stay of execution of the judgment
21 upon the posting of a supersedeas bond for the \$11,000,000, but not the punitive damages
22 portion of the award. *Id.* Defendants sought a stay under Rule 62(b), which the court
23 denied. Defendants also argued that Rule 62(f) applied to the judgment and therefore they
24 did not need to post a supersedeas bond for the punitive damages awarded. The court
25 decided that Rule 62(f) did not apply, pointing out that the defendants' primary asset was
26 not real estate, but rather an interest in a business.¹ *Id.* at *3. Further, the court found Rule

27 ¹ The business interest, according to the defendants, was worth \$100 million; the court
28 clearly found this asset valuation important in analyzing the proposed bond amount.

62(f) inapplicable because A.R.S. § 12-2108(A) does not apply during the pendency of post-trial motions. *Id.* The court did state that “[m]any courts have held that Rule 62(f) does not apply if a judgment creditor must take further action on a judgment before a lien arises under state law.” *Id.* at *2. But if those acts are merely ministerial, Rule 62(f) applies. *Id.* at *3. In the end, the court fashioned a stay remedy for the post-trial motions period and stated that once post-trial motions are decided, the issue of supersedeas bond for appeal would again be taken up. *Id.* at *4.

Wichansky does not apply. The judgment in *Wichansky* was not one for judicial foreclosure; instead it was a multi-million dollar damages award. The court ruled that Rule 62(f) did not apply because the at-issue asset was a \$100 million business rather than real estate, and the judgment had not been recorded.

Based on the applicable Arizona statutes, the public policy of this State, and the nature of the Judgment which under Arizona law is a “lien of judgment,” Rule 62(f) applies. Steinberger requests that the Court order a stay of execution of Judgment with the posting of no supersedeas bond, as is fully supported by the Motion previously filed (Doc. Nos. 213, 215).

B. Steinberger is Entitled to a Stay Under Rule 62(d) Without Supersedeas Bond.

Even if the Court refuses to reconsider the Motion under Rule 62(f), Steinberger is nevertheless entitled to a stay of execution with no bond under Rule 62(d):

If an appeal is taken, the appellant may obtain a stay by supersedeas bond.... The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

Very few cases interpret the application of Rule 62(d) to the judicial foreclosure setting. One such case, however, decided that Rule 62(d) applies to an application for a stay of a mortgage foreclosure judgment. *United States v. Mansion House Center Redevelopment Co.*, 682 F.Supp. 446, 448 (E.D.Mo. 1988). The *Mansion House* court described the purpose of a supersedeas bond:

1
2 A supersedeas bond essentially serves as a guarantee by the appellant that he
3 will satisfy the judgment plus interest and costs if it is affirmed on appeal.
4 The bond thus serves three main purposes: first it permits the appellant to
5 appeal without risking satisfying the judgment prior to appeal and then being
6 unable to obtain a refund from the appellee after the judgment is reversed on
7 appeal; second, it protects the appellee against the risk that the appellant
8 could satisfy the judgment prior to the appeal but is unable to satisfy the
9 judgment after the appeal; and third, it provides a guarantee that the appellee
10 can recover from the appellant the damages caused by the delay incident to
11 the appeal, that is the bond guarantees that the appellee can recover the
12 interest that accrues on the judgment during the appeal.

13 *Id.* at 449 n. 5.

14 The *Mansion House* court then set to the analysis of what the appropriate amount of
15 the supersedeas bond would be, if the court were to require one. The judgments foreclosed
16 defendants' interests in real property and directed that such property be sold. *Id.* at 447.
17 Therefore, the court held that "because there is no money judgment, no bond amount is
18 required with respect to the judgment itself." *Id.* at 450. As to accruing interest, the court
19 held that plaintiff is not entitled to recover any interest from defendants, thus no bond
20 amount was required with respect to future interest. *Id.* Because plaintiff did not seek to
21 require defendant to post a bond to cover the anticipated costs of the appeal, the court
22 required no bond amount with respect to costs. *Id.* To the extent plaintiff sought security
23 for the potential future decline in value of the property, the court ruled that "defendants are
24 not required to post a supersedeas bond to insure against this risk because plaintiff would
25 not be entitled to recover this potential damage from defendant or from the bond." *Id.*
26 The court concluded, by granted a stay of operation of the foreclosure judgments pending
27 appeal, with no supersedeas bond. *Id.*

28 Applying *Mansion House*, no supersedeas bond should be required here. The
Judgment is not an *in personam* money judgment, but rather is *in rem* against the Property
only. See Doc. 212 ¶ 2. The Judgment does not award any amounts against
Plaintiffs/Counterdefendants/Third-Party Defendants, nor could it. Under clear Arizona
authority, DBNTC as Trustee cannot recover **any sum** from those parties for any

1 deficiency of principal, interest or other costs or attorneys' fees under the Judgment, over
2 the fair market value of the Property itself. A.R.S. §§ 33-729(A); 33-814(G). In this
3 judicial foreclosure action subject to Arizona's anti-deficiency statutes, no supersedeas
4 bond can be ordered, because DBNTC as Trustee is not entitled to collect any amounts; it
5 may proceed against the Property only. And because DBNTC as Trustee did not request
6 any bond for security for costs on appeal, none can be awarded. *See* Doc. 214.

7 An Arizona District Court decision confirms this outcome. *Biltmore Associates,*
8 *L.L.C., as Trustee v. Twin City Fire Ins. Co.*, 2007 WL 2422053 (D.Ariz. Aug. 22, 2007).
9 Plaintiff in that action sought a stay of an attorney's fee judgment pending appeal, under
10 Rules 62(c) and 62(d). *Id.* at *1. In determining whether a waiver of supersedeas bond
11 would be allowed under Rule 62(d), the court listed criteria to be considered:

12 (1) the complexity of the collection process; (2) the amount of time required
13 to [collect] a judgment after it is affirmed on appeal; (3) the degree of
14 confidence that the district court has in the availability of funds to pay the
15 judgment; (4) whether the [plaintiff's] ability to pay the judgment is so plain
16 that the cost of a bond would be a waste of money; and (5) whether the
17 [plaintiff] is in such a precarious financial position that the requirement to
18 post a bond would place other creditors of the [plaintiff] in an insecure
19 position.

20 *Id.*

21 These criteria highlight the fact that a supersedeas bond in the context of this *in rem*
22 Judgment for judicial foreclosure would be inappropriate and would not serve the purpose
23 behind the posting of such a bond. There are no issues of "collection," or of whether
24 Plaintiffs/Counterdefendants/Third-Party Defendants have funds to pay the Judgment now
25 or post-appeal. **There is no money judgment to be paid.**² The posting of a bond protects
26 the prevailing party from the risk of a later uncollectible judgment. *Id.* at *2. But here,
27 there is no such risk. Accordingly, under Rule 62(d), no supersedeas bond is warranted for
28 stay of execution of the Judgment. *See also, Simon Property Group, Inc. v. Taubman*
Centers, Inc., 262 F.Supp.2d 794, 799 (E.D. Mich. 2003)(where prevailing party cannot

² Steinberger has demonstrated her precarious financial position. *See* Doc. 215-1.

1 show any damages it would be entitled to, that could be paid out of a supersedeas bond, no
2 bond may be ordered for a stay pending appeal).

3 Former Rule 73(d), rescinded in 1968, “is still a useful guide” in determining the
4 amount of a supersedeas bond. 11 Fed. Prac. & Proc. Civ. § 2905 (3d ed.). Under that
5 former Rule, the supersedeas bond to stay a judgment to foreclose a mortgage “shall be
6 fixed at such sum only as will secure the amount recovered for the use and detention of the
7 property, the costs of the action, costs on appeal, interest, and damages for delay.” *Id.*

8 The only amount DBNTC as Trustee sought, related to the supersedeas bond, was
9 for the full amount of the *in rem* Judgment against the Property, \$765,248.23. *See* Doc.
10 214 at 3. In the context of a judicial foreclosure, no Rule, and no law interpreting Rule 62
11 or former Rule 73, supports that position. Further, DBNTC as Trustee did not recover any
12 amount for the use of the Property, or any other damages from any litigant personally.
13 Again, the *in rem* Judgment gives no rights to pursue Plaintiffs/Counterdefendants/Third-
14 Party Defendants for any funds. Plaintiffs/Counterdefendants/Third-Party Defendants
15 should not be ordered to post any supersedeas bond amount, since they are not liable for
16 any damages. A.R.S. §§ 33-729(A); 33-814(G); *see also*, Judgment and Decree of
17 Foreclosure (Doc. 212).

18 19 **III. CONCLUSION.**

20 Accordingly, Plaintiffs/Counterdefendants/Third-Party Defendants respectfully
21 request that the Court reconsider its denial of the Motion under Rule 62(f) and order a stay
22 of execution of the Judgment and Decree of Foreclosure without the posting of any
23 supersedeas bond, until any and all appeals and discretionary reviews of that Judgment are
24 completed. In the alternative, Steinberger respectfully submits that she is entitled to a stay
25 of execution of the Judgment without the posting of any supersedeas bond under Rule
26 62(d), because the Judgment is one for judicial foreclosure, and DBNTC as Trustee will
27 not be entitled to recover any deficiency or other amount from Plaintiffs/
28 Counterdefendants/Third-Party Defendants, under the Judgment.

1 RESPECTFULLY SUBMITTED this 2nd day of February, 2017.

2
3 **BARBARA J. FORDE, P.C.**

4 By: s/Barbara J. Forde
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9 Copy of the foregoing served via
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